**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**

**CRIMINAL APPEAL No. 1237 of 2004**

**For Approval and Signature :**

## HONOURABLE MR.JUSTICE C.K.BUCH

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| 1 | Whether Reporters of Local Papers may be allowed to see the judgment ? | |
| 2 | To be referred to the Reporter or not ? | |
| 3 | Whether their Lordships wish to see the fair copy of the judgment ? | |
| 4 | Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ? | |
| 5 | Whether it is to be circulated to the civil judge ? | |

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**KISHORKUMAR MANUBHAI CHAUHAN - Appellant(s)**
**Versus**
**STATE OF GUJARAT & 1 - Opponent(s)**

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**Appearance :**
MR BP MUNSHI for Appellant(s) : 1,
MR PD BHATE, LD.APP for Respondent (s) : 1,

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## CORAM : HONOURABLE MR.JUSTICE C.K.BUCH

**Date : 28/12/2007**

**CAV JUDGMENT**

1. The appellant is the orig.accused no.1 of Sessions Case No.236 of 1996 (hereinafter referred to as 'the appellant') decided on 21st July 2004 by the learned Sessions Judge, Mehsana. Two accused persons were chargesheeted and prosecuted but the orig. accused no.2-Janakkumar Babulal Barot expired

pending the trial. Therefore, the trial against him was treated as abated. The learned Sessions Judge convicted the appellant herein for the charge of offences punishable under Sections 376 and 306 of the Indian Penal Code and sentenced him to undergo rigorous imprisonment for seven years and to pay a fine of Rs.500/- and in default of payment fine to undergo further simple imprisonment for one month for the offence punishable under Section 376 of the Indian Penal Code; and so far as the offence punishable under Section 306 of the Indian Penal Code is concerned, he is sentenced to undergo rigorous imprisonment for five years and to pay a fine of Rs.500/- and in default of payment of fine, he is ordered to undergo simple imprisonment for one month. The learned trial Judge has ordered both the sentences to run concurrently. The learned trial Judge has held that the appellant had committed the aforesaid offences along with the orig.accused no.2-Janakkumar Barot (deceased). Originally both the accused persons were alleged to have committed the offences punishable under Sections 452, 376,

506(1), 306 read with Section 114 of the Indian Penal Code and it was held to have been proved that both the accused persons had committed rape on the victim-deceased and under the shock of the heinous crime committed on her, the victim committed suicide at her residential premises.

2. The judgment and order of conviction and sentence have been challenged by the appellant on various grounds as mentioned in the memo of appeal and Shri B.P. Munshi, learned counsel appearing with Shri H.D. Chudasama for the appellant, has taken me through all those grounds of challenge as well as the oral and documentary evidence led during the course of trial. It is submitted by Shri Munshi that the finding recorded by the learned trial Judge is erroneous, including the settled legal position qua the law as to the appreciation of evidence. The infirmities in the evidence led and the lacunas left by the Investigating Agency resulting into serious prejudice to the appellant, have been ignored by the learned trial Judge while recording the finding of the

guilt. The internal conflicts and inconsistencies in the evidence led by the prosecution, according to Shri B.P. Munshi, are sufficient to reach to a conclusion that the accused might have been implicated falsely in the crime by PW-1 Motibhai Amibhai, a suspended Police Constable of Kalol Police Station (North Gujarat). It is submitted that the written arguments and the authorities cited placed before the learned trial Judge practically have been ignored while dealing with the case of the prosecution. The submissions of Shri Munshi in nutshell are as under :

(i) The verbose and meticulously detailed detailed complaint given by the victim-deceased being also a dying declaration along with the statement of the victim-deceased recorded by the Executive Magistrate in the Civil Hospital have been wrongfully considered as reliable piece of evidence for basing conviction by the learned trial Judge. The procedural infirmities, conflicts and

improvements in these two statements made by the victim-deceased in the background of the conduct of PW-1 Motibhai Amibhai and the conduct of the victim-deceased immediately prior to the alleged incident and her admission in the Civil Hospital at Ahmedabad at the earliest stage, make both the aforesaid statements in the nature of produced as dying declarations, as untrustworthy and unreliable.

(ii) The delay, in informing the police, deliberately caused by PW-1 who, according to the prosecution, had reached at the spot of the incident within a couple of minutes of commission of suicide, makes the sub-stratum of the story of the prosecution doubtful; otherwise PW-1 Motibhai could have informed the Kalol Police Station, which is his Head Quarter during suspension period, in couple of minutes or he himself could have informed either Kalol Police or the Police personnel who were

on duty at the Civil Hospital. The victim-deceased could have been taken to Kalol Hospital first/initially. As PW-1 Motibhai was all throughout in the company of victim-deceased, he had an ample opportunity to tutor her so that he can exonerate himself from explanatory situation and implicate the accused persons who were inimical to him. The landlord of the victim-deceased and her neighbours have not supported the prosecution case as to the involvement of the accused persons. Evidently, PW-1 is unable fully and convincingly to corroborate the alleged dying declarations and the inherent inconsistencies emerging from three crucial pieces of evidence i.e. two statements of victim-deceased and the deposition of PW-1 Motibhai, falsifies the prosecution story.

(iii) There is even conflict in the case of the prosecution as to the number of persons involved in the offences as

alleged and their active participation. The learned trial Judge has not appreciated various probabilities which go to the root of the trustworthiness of both the dying declarations, evidence of PW-1 Motibhai and those which support the prosecution theory. If the history given by the victim-deceased to the doctor of Civil Hospital is perused, the same is either inconsistent or conflicting with the story told to the Executive Magistrate by her in her dying declaration, which needs serious scrutiny. This Court while dealing with the appeal under Section 374 read with Section 386 of the Code of Criminal Procedure, 1973, is empowered to appreciate the entire evidence afresh. If the deposition of PW-1 Motibhai transpires to be unreliable piece of evidence, the appellant deserves acquittal. If the Court is able to perceive some shadow of doubt qua the evidence available in the nature of dying declarations, then also the

appellant deserves to be acquitted.

(iv) Some crucial aspects which could have linked the appellant with the crime sufficiently were not touched at all by the Investigating Agency and the accused persons have a reason to believe that as the suspended Police Constable of the very Kalol Police Station was active and perhaps had link with the act of suicide committed by the victim-deceased, certain investigation on crucial aspects has not been carried out in the present case. The photographs of the premises (produced during the course of hearing) where the incident occurred and the entire portion of the building where this premises is located, falsifies the theory of entry of about five persons in the residential premises of the victim-deceased or any person other than PW-1 Motibhai, including appellant; so also, the theory of any hubbub.

(v) The medical evidence collected qua the evidence of rape does not support the

case of the prosecution. The report of the Forensic Science Laboratory nullifies the theory of rape; and that too by two persons. The prosecution is under obligation in such cases to prove that the act was suicidal. Some possibilities show that the death may be homicidal. PW-1 Motibhai may have committed offence by pouring kerosene on the body of the victim-deceased or on account of the conduct of PW-1 Motibhai, the victim-deceased might have committed suicide. There is ample evidence on record to show that this PW-1 Motibhai was a regular visitor of the house of the victim-deceased. The victim-deceased was residing once in village Panchot, Taluka Kalol (North Gujarat), and then she had shifted to her parental village at Nardipur. The social character of the victim-deceased and her conduct qua her parents and children, which has been brought on record, put the victim as a witness on a lower pedestal compared to other victims approaching the Police or

the Court alleging commission of rape. The panchnama of the body of the deceased at Ex.21 to some extent nullifies the theory of use of force by the offender allegedly committing rape. It appears that somebody had sprinkled kerosene on the body of the victim-deceased, otherwise the private part of the body of the victim-deceased would not have sustained burns of higher degree when the hairs of the victim-deceased mainly had not been burnt and even “Bindi” on her forehead had remained intact. The learned trial Judge has not appreciated the crucial and critical aspects of evidence in proper perspective which has landed him on an incorrect conclusion.

3. Shri P.D.Bhate, learned Additional Public Prosecutor, has submitted that the finding of guilt has been recorded mainly on the dying declaration recorded by the Executive Magistrate at Civil Hospital in couple of minutes of arrival of the patient in the

hospital. The officer, who had recorded the statement, had taken due care and caution before recording the statement of the victim-deceased and when the learned trial Judge has found that the allegations which are made against the appellant in the dying declaration recorded by the Executive Magistrate find corroboration from the contents of the complaint which is again a dying declaration, the judgment and order of conviction and sentence cannot be said to be based on erroneous findings. The presence of the accused persons i.e. present appellant and the orig. accused no.2, proved to be near the house of the victim-deceased, is an important corroborative piece of evidence and there was no reason for the learned trial Judge to disbelieve PW-1 Motibhai, a suspended Police Constable. The terms between PW-1 Motibhai and the appellant were not such inimical that he may implicate the accused persons falsely by concocting the story. Merely because PW-1 Motibhai could have informed Kalol Police Station immediately or within a reasonable time, does not make the FIR in question

doubtful. The presence of PW-1 Motibhai all throughout also does not make him a partisan witness. So the finding of guilt recorded by the learned trial Judge is not required to be disturbed. The Executive Magistrate had taken care to verify the endorsement made by the doctor on the letter of requisition received by him. Fortunately, the Executive Magistrate was present in the Hospital for recording dying declaration of some other victim and therefore, without any delay, the dying declaration in the present case has been recorded by the Executive Magistrate. There was no reason for the victim to agree with the proposition made by PW-1 Motibhai with regard to implication of about five persons in the crime initially. For short, according to Shri P.D. Bhate, learned Additional Public Prosecutor, the conviction is required to be upheld.

4. Further, according to Shri P.D. Bhate, the medical evidence is an opinion evidence and when the direct evidence in the nature of dying declarations, was available before the

learned trial Judge, the learned trial Judge rightly held that there is sufficient evidence to link the accused with the crime. It is settled legal position that if the Court is able to listen the ring of truth in the dying declarations made by the victim-deceased and the statements recorded in the nature of dying declarations are found otherwise admissible under Section 32 of the Indian Evidence Act, the accused can be linked with the crime and there is no need to seek any corroboration. Seeking of corroboration in the cases based on dying declaration, in a given circumstance, is the rule of prudence, and not of law. Thus, according to Shri P.D.Bhate, learned Additional Public Prosecutor, there is no substance in the appeal and, therefore, it is required to be dismissed.

5. To appreciate the rival contentions, it would be beneficial to state the case of the prosecution in brief, which is as under :

5.1 The incident in question had occurred on 13th November 1995 and for the last 15 days from the date of incident, the victim-deceased was

residing as a tenant in the house of one Dhanjibhai Patel of village Nardipur, Paliyad Road, Tal. Kalol, Dist. Gandhinagar. As regards her social status, the victim-deceased was driven out by her husband from his house. Their children were residing with her husband. Prior to occupying the house of Dhanjibhai Patel at Nardipur, she was residing at Panchot, Taluka Kalol.

5.2 On the date of incident, she had gone to Kalol from Nardipur for the purpose of purchasing grocery articles. At about 06-30 p.m., she wanted to return from Kalol to Nardipur and so she went to Kalol Bus Stand to board a bus to Nardipur. At that time, she realised that the present appellant and the orig.accused no.2-Janakkumar Barot (deceased) were following her. She knew them since earlier time when she had an occasion to go to Kalol GIDC area in search of some job. At that time, the appellant herein had come in her contact. She was already knowing orig.accused no.2-Janak Barot as the friend of appellant herein. The victim-deceased boarded the bus destined to

Mansa from Kalol and reached Nardipur at about 07-00 p.m. Both the accused followed the victim-deceased on two scooters and when the victim-deceased entered into her house, both the accused persons entered the house of the victim-deceased and threatened her and thereafter, both of them committed rape one after another on her. Because of the tortious act and the rape committed on her, she was shocked and felt ashamed, and committed suicide. Initially, the complaint was registered for the offences punishable under Sections 452, 376, 506(1), 107 and 114 of the Indian Penal Code. But after the death of victim-deceased, the police added the charge of offence punishable under Section 306 of the Indian Penal Code. It is alleged that when the accused persons, after committing rape were leaving the house of the victim-deceased, both of them were seen by PW-1 Motibhai Amibhai on the scooter which was parked and when PW-1 Motibhai Amibhai reached where the victim-deceased was residing, he saw the victim-deceased ablazed. PW-1 Motibhai with a large quilt extinguished the fire and saved the

victim-deceased; and with the help of one neighbour namely PW-2 Dahyaji Jashaji Thakor and one Rajubhai Gokaldas Patel alias Gokabhai Patel, managed to put the injured victim into the jeep car brought by Rajubhai Gokaldas Patel at the instance of PW-1 Motibhai and thereafter, she rushed and shifted to Civil Hospital at Ahmedabad. It is the say of the prosecution that in the Civil Hospital, the victim-deceased had given history as to the incident and and her dying declaration came to be recorded and thereafter also the complaint.

5.3 To bring home guilt to the accused, the prosecution examined 10 witnesses. Five of them are doctors i.e. PW-6 Dr.Nayankumar Natvarlal Parikh(Ex.60); PW-8 Dr.Rameshchandra Bhagubhai Shah (Ex.65); PW-9 Dr.Vikas Kanval Kishor (Ex.68); PW-3 Dr.Satish Amrutlal Patel (Ex.38); PW-7 Dr.Jayantilal Virjibhai Satapara (Ex.63); and PW-10 Investigating Officer Savjibhai Jayrambhai Vadhasiya (Ex.71). The prosecution examined other witnesses namely PW-2 Dahyaji Jashaji Thakor, one of the tenants residing in the same building and

adjoining the premises rented to the victim-deceased, has been examined vide Ex.18. The jeep car driver and also other persons who had helped in shifting the victim-deceased to the hospital, including neighbour Rajubhai Gokaldas Patel, have not been examined. PW-4 Ranjitsinh Virsangbhai Gohil examined vide Ex.41 by the prosecution, was the Executive Magistrate, who had recorded the dying declaration of the victim-deceased on 13th November 1995. PW-5 Girishbhai Mulchanddas Patel, examined vide Ex.58 is a panch witness who has been examined to prove the panchnama of the scene of incident at Ex.59. The prosecution mainly relies on two dying declarations as mentioned earlier as well as the deposition of the PW-1 Motising Amibhai as per Ex.17. The documentary evidence made available to the trial Court comprised of (i) complaint given by the victim-deceased at Ex.72; (ii) the panchnama of scene of occurrence at Ex.59; (iii) dying declaration recorded by the Executive Magistrate at Ex.44; (iv) Inquest Panchnama at Ex.25; (vi) Certificate of Cause of Death issued by the

doctor at Ex.27; (vii) Medical Certificates of both the accused persons, including the appellant at Exs.29 and 30 respectively; (viii) panchnama of recovery of clothes and physical conditions of appellant and orig. accused no.2 at Exs.22 and Ex.24; (ix) the forwarding letter to Forensic Science Laboratory is at Ex.31; (x) the report of Forensic Science Laboratory including the forwarding letter is at Ex.37. One another document which appears to be important and relevant is Forensic Science Laboratory (mobile) report and the same is at Ex.23. A report forwarded to the Investigating Officer Shri Vadhasiya by P.S.O. Kalol Taluka Police Station is at Ex.20. Here it is pertinent to note that the FIR is of 14th November 1995 and the offence was registered at 17-15 hrs. on 14th November 1995. This fact emerges from one document at Ex.19. One entry in the Police Station was registered as “Janva Jog” entry bearing No.109 of 1995 dated 14th November 1995 at about 08-55 a.m. When the Court is dealing with the appeal against the judgment and order of conviction and sentence preferred under

Section 374 read with Section 386 of the Code of Criminal Procedure, 1973, the entire evidence is required to be read and gone through before the Court can reach to a just conclusion and that is the endeavour of Shri B.P.Munshi as well as Shri P.D. Bhate, learned Additional Public Prosecutor. True it is that if the Court is in agreement with the findings recorded by the learned trial Judge, the Court may not assign its reasons while recording the agreement, but at the same time, may include the grounds as to why the finding of guilt is required to be confirmed. While dealing with the appeal preferred by a convict, normally the Court should give a fresh look from all the angles to the evidence led by the prosecution in the background of the sub-stratum of the story of the prosecution and while doing so, the Court is to keep in mind the defence plea and all other relevant probabilities emerging from the record of the case even though a particular specific plea may not have been raised as a defence plea. The Appellate Court has to set out sound reasons for recording its ultimate conclusion

and if it is not possible to conclude that the prosecution has established its case beyond reasonable doubt, obviously the accused is entitled to get the benefit.

6. In view of the aforesaid submissions and factual aspects, the following main points crop up for consideration :

(i) Whether both or any one of the dying declarations given by the victim-deceased tendered in evidence can be held to be voluntary and trustworthy ?

(ii) Whether both or any one of the dying declarations can be relied upon to connect the appellant with the crime ?

(iii) If the Court finds that the dying declarations suffer from infirmities, whether the infirmities pointed out to the Court are serious and capable of exclusion of dying declarations from consideration ?

(iv) Whether the version of any material prosecution witness examined in

respect of facts and sub-stratum of story of prosecution and the conflict in evidence of material witnesses examined, substantially affect the story of the prosecution ?

(v) Whether the documentary evidence relied upon by the prosecution has an impact on the ultimate theory canvassed by the prosecution, including the opinion evidence tendered by the prosecution during trial ?

2. On a close scrutiny of the evidence, it transpires that as such there would have been three statements of the victim-deceased on record, out of which one statement which the victim-deceased could have made or must have made immediately after the incident on arrival of her neighbours or while she was being shifted to the Civil Hospital after lifting her in a large quilt and putting her into the jeep-car arranged by PW-1 Motibhai, has not come on record. It is not possible to assume that she might have opened her mouth for the

first time when she was interrogated by the doctor of Civil Hospital while recording history. It is the say of the prosecution that the offence had occurred between 07-00 p.m. and 07-30 p.m. on 13th November 1995; and thereafter, she was taken to Civil Hospital at Ahmedabad by PW-1 Motibhai. At about 09-45 p.m. on 13th November 1995, she was admitted in the hospital for treatment and this time is reflected in the case papers of the Civil Hospital and the name of PW-1 Motibhai is shown as a person who got the patient admitted. It is in evidence that the history was given by the injured victim herself to the doctor on duty immediately after she was admitted in the hospital. In that view of the matter, there are three statements of the victim-deceased : First in the nature of history recorded by the doctor of Civil Hospital; second, a statement recorded by the Executive Magistrate between 10-15 p.m. and 10-35 p.m. on 13th November 1995 at Civil Hospital; and the third, a detailed complaint given by her on 14th November 1995 to the Police Officer of Kalol Police Station. These

three statements need evaluation being in the nature of dying declarations in the background of the oral evidence given by PW-1 Motibhai; PW-2 Dahyaji Jashaji Thakor; and some crucial portion reflected in the panchnama of the scene of occurrence drawn by the Investigating Officer. The Postmortem Note is at Ex.61. The treatment case papers of the victim-deceased of Civil Hospital at Ahmedabad, tendered in evidence and the Forensic Science Laboratory report in respect of analysis of various muddamal articles, are also there on record. It is pleaded specifically that as both the accused persons including the appellant committed rape, the victim-deceased under shock and loss of honour - a humiliation committed suicide. It is important to note that there is no iota of evidence to establish that rape was committed at all on the victim-deceased. The commission of rape was disclosed at a very initial stage at the time when she was being admitted in the hospital. In the history given by the victim-deceased, she specifically stated that she committed suicide as she was raped. The alleged rape must have

been committed between 06-30 and 07-30 p.m. The victim-deceased was very well there in the Civil Hospital at 09-45 p.m. and her dying declaration was recorded by the Executive Magistrate in a couple of minutes on her admission in the Hospital and it was recorded during the time when she was undergoing the treatment. The examination carried out of clothes of both the accused persons by the Forensic Science Laboratory does not support the theory of rape as no incriminating things like semen, etc. were detected. Ex.31 is the forwarding letter sent by the Investigating Officer to the Forensic Science Laboratory and about 12 parcels were sent to the Forensic Science Laboratory for examination, including the under-wears of the accused persons. The Parcel No.10 glass bottle was containing the blood sample of the victim-deceased. Parcel Nos.11 and 12 were the glass bottles containing saliva, pubic hairs, urinal swab and blood of both the accused persons. Parcel No.11 was of the samples taken from the appellant herein and Parcel No.12 was of the orig.accused no.2 (deceased) Janak Barot.

These samples were collected by Dr.Sarlaben Patel. Parcel No.9 sent for analysis was containing samples collected by Dr.B.S. Dave, Chief Medical Officer, Civil Hospital, Ahmedabad. It was a glass bottle containing vaginal swab of victim-deceased. This sample was taken during the initial treatment of victim-deceased on 14th November 1995. Those queries were sent by the Investigating Officer and in response thereof, the Forensic Science Laboratory expert has opined that no semen was found on any of the articles analysed, including the vaginal swab of the victim-deceased and the bed-sheet described as “Chadar” in the forwarding letter. In the vaginal swab, the Forensic Science Laboratory had found sample of blood and it was not possible to determine the blood-group. So serological examination of the relevant articles i.e. vaginal swab, blood samples and saliva swab, do not corroborate the case of the prosecution with respect to commission of rape and that too by two persons. The history given by the victim- deceased to the doctor as recorded in the case papers which needs to be

considered as the first basic story of the prosecution, says that the orig.accused no.2-Janakkumar Barot and one “Garasiya”, both raped her and three other persons had caught her hold at that moment. Thus, she had conveyed that the orig.accused no.2-Janakkumar and one another person mentioned as “Garasiya” with the help of other three persons committed rape on her and three accomplices had used force in catching hold of her and therefore, she poured kerosene on her body and committed suicide at 07-30 p.m. Thus, she had told that total five persons were there and two of them have committed rape. The another person who committed rape was not named in the statement given by her. It is in evidence that PW-1 Motibhai had accompanied her from the spot of the incident to Civil Hospital, but in couple of minutes after giving history to the doctor on duty, in the statement recorded by the Executive Magistrate at Ex.42, she has set out materially a different version. While appreciating the say of the victim-deceased made before the Executive Magistrate, it would be necessary to note that the Executive

Magistrate was very well present in the Hospital for the purpose of recording dying declaration of some other victim and before he could leave the Civil Hospital, the hospital duty Police Constable called the Executive Magistrate and gave him the letter of requisition and Yadi and, therefore, the statement of victim-deceased came to be recorded between 10-15 p.m. and 10-35 p.m. When her statement was recorded, the hospital doctors had started treating the victim-deceased. It is in evidence that the victim was educated and she had studied upto Std.7 and she had signed the dying declaration made by her before the Executive Magistrate. According to her, the incident had occurred in her kitchen at about 07-30 p.m. She has stated in her statement that her marriage was solemnized before about 11 years. She has one son and one daughter out of the said wedlock. Both the children were staying with her husband and as there were quarrels between her and her brother-in-law (younger brother of husband) and also as to the household work, she was driven out by her husband for the last

about one year prior to the incident. According to her, she had two full-blood brothers. Both were married but as the relations between the victim-deceased and her sisters-in-law (brothers' wives) were not cordial, she was not residing with them. The village Nardipur is her parental village. Though the parental home was very well there in the village Nardipur, she had chosen to stay in a rented house. On the date of incident, she had gone for purchasing jaggery, sugar and other articles from Kalol and while she was returning from Kalol by bus towards Nardipur, the orig.accused no.2-Janakkumar Barot and appellant herein of Ahmedabad, who is serving in one of the factories at Kalol, pursued the bus. After getting down at Nardipur, while she was walking up towards her home. She noticed that both the accused who were following her, chased her and came inside her house. According to her, both of them were on two scooters. They came inside the house and committed rape on her. At this juncture, it would be necessary to note that the victim-deceased used to stay on the first floor. The

landlord was staying on the ground floor. The house of the landlord was closed. Both the accused committed rape and ultimately drove away their scooters. Thereafter, the victim-deceased poured kerosene on her body and blazed her. She has stated that thereafter she started shouting for help and at that time, PW-1 Motibhai, one Gokaldas alias Gokabhai Patel arrived there and with the help of a large quilt they extinguished the fire. She has stated that she did not know the names of the father of both the offenders. It is pertinent to note that who gave the name of second accused, whom she did not know at the time when she gave history, has not come on record. There is a clear conflict as to the number of persons who might have sexually assaulted her. This material conflict goes to the root of the theory of commission of rape by both the accused persons. The insertion of the name of present appellant and the reduction in the number of persons who actually were party in commission of rape, make the theory of rape doubtful, especially when, as discussed earlier, there is no

corroborative piece of evidence on record in the nature of Forensic Science Laboratory opinion. It has come on record that PW-1 Motibhai was the first person who entered into the house of victim-deceased when she was blazed and before this PW-1 Motibhai could extinguish the fire, he got assistance of another person who has been named specifically by the victim in her dying declaration. On plain reading of the depositions of the Investigating Officer and panch witness Girish Patel examined to prove the scene of offence panchnama at Ex.59, the following facts have emerged :

(i) That the house where the deceased was residing was on the first floor and the same was at a distance of 10 minutes walk from the main bus-stand of village Nardipur. The said road is leading to village Paliyad and the building where the victim-deceased was residing wherein the incident has occurred, is at a distance of 50 to 100 steps from the border of the road.

In the nearby area there are other residential premises. It was a two storeyed building i.e. the ground floor and the first floor, and the victim-deceased was residing on the first floor. There were two blocks on the first floor. In one block on the first floor, the victim-deceased was residing and in the adjacent block on the same floor, PW-2 Dahyaji Thakor was residing. On the ground floor, one block was occupied by the owner and the other block was rented to the third tenant i.e. Rajubhai Gokaldas Patel. There was a staircase leading to the first floor for having access to the First Floor and so one has to enter first through the main gate on the ground floor. Th front gate was fitted with iron grill. So only after opening the said grilled front gate one can enter the open abutting land and, thereafter one can climb on the first floor. The cot in the residential premises of the victim-

deceased was covered with a bed-sheet on the mattress and the incident occurred in the kitchen portion of the block occupied by the victim-deceased. According to PW-2 Dahyaji, on whose evidence the prosecution intends to rely and who has not been declared hostile in his cross-examination has stated that he was very well there in his house with his son and daughter, and he was watching some programme in the television and at that time, he heard some hubbub and therefore, he rushed out of his block. At that time, he saw PW-1 Motibhai breaking open the doors of the victim's house and found that victim-deceased was blazed. At that time, Rajubhai Gokaldas, who was residing on the ground floor, also reached there. PW-1 Motibhai summoned a car with the help of said Rajubhai. All of them brought the victim-deceased upto the jeep-car and thereafter, she was taken to Civil Hospital. According to this witness,

there was darkness when the incident occurred. About 15 days prior to the date of occurrence, the victim-deceased had occupied the block and PW-2 Dahyaji had come to know PW-1 Motibhai as a policeman even prior to the incident as this PW-1 Motibhai was visiting the house of the victim-deceased frequently. PW-2 has said in his cross-examination that when he came out of his house, on hearing the shouts of victim-deceased, he had seen PW-1 Motibhai there. He has also stated in his cross-examination that till the said injured victim was taken and placed in the jeep car, the victim-deceased had not said anything about the incident; meaning thereby, the victim-deceased had neither said nor anybody had asked her as to why and how the incident in question happened. It is indisputably established that PW-2 and victim-deceased were staying on the first floor. Their blocks were adjacent to

each other and they had been using a common open space like terrace. So the landlord was not there, but the other two tenants were present and both the tenants including the neighbour PW-2 Dahyaji had tried to save the victim-deceased by extinguishing the fire and lifting her from the place of incident to the jeep car arranged by PW-1 Motibhai through the said Rajubhai. For the reasons best known to the victim-deceased, she did not disclose the presence of two crucial witnesses i.e. PW-2 Dahyaji Thakor and Rajubhai Gokaldas Patel who were present on the spot soon after the incident. She had stated that 'Gokabhai Patel' was present. Neither the said Gokabhai nor Rajubhai Gokaldas has been examined and there is no reference in the deposition of PW-1 Motibhai or in the scene of occurrence panchnama that any of the doors either front or kitchen door was found broke opened. Normally if a person intends to commit suicide,

he or she would try to shut and bolt the house or room from inside but here there is no clear evidence as to whether the house of the victim-deceased was bolted from inside or the doors were just closed, so PW-1 Motibhai could have entered immediately. True it is that PW-2 Dahyaji was watching television programme and he might not have seen either two or five accused persons entering the house of the victim-deceased. According to PW-1 Motibhai, he had seen two accused persons i.e. both the accused leaving on one scooter when he reached near the building where the victim resided. Thus, this witness does not mention any persons other than the two accused persons named by the victim-deceased as persons responsible for commission of rape. So the earliest story narrated by the victim-deceased before the Medical Officer of the Civil Hospital stands falsified; otherwise

either PW-1 or PW-2 at least could have seen other three accused persons either leaving the spot of incident or escaping on the vehicle arranged by them after doing away with crime. It would not be legal or prudent to believe that three persons might have left the spot of incident prior to commission of rape by the second accused or both the accused might have stayed in the house of the victim-deceased for some more time because it is said by the victim-deceased herself that both the accused had just followed her and one of them was 'Garasiya'; not named by her in the history given to the doctor of Civil Hospital, and these two persons committed rape on her and therefore, she poured kerosene on herself immediately. She had started from Kalol to Nardipur in the State Road Transport Bus at about 06-30 p.m. She had gone to Kalol for purchasing grocery articles. However, no such

articles were found or seen in the kitchen portion or any of the portion of the block occupied by the victim-deceased, otherwise it would have been recorded in the scene of offence panchnama. It would be nothing but a conjecture if is imagined that she might have stored these articles in the respective utensils meant for such purpose the switfness with which she rushed into her house without crying for any help to stop the strangers from entering her house and no sooner she entered, according to her, she was raped which crushed her mentally and to get freedom from the shackles of shame and loss of honour doused kerosene an set her on fire. Thought she did not seek any help or alerted others and neighbours right from boarding the bus, walking up the distance leading to her house and then also the neighbours with whom she had normal relations. The presence of PW-1 Motibhai incidentally at the very

moment raises cluster of doubts about his credibility. The incident narrated by her even does not give any time for arranging such purchased articles. It has specifically come on record that the victim-deceased was not only dominated by and under obligations but also had close relations with PW-1 Motibhai. It is also in evidence that PW-1 Motibhai and both the accused persons were knowing one another since long prior to the incident and in the same way, the victim-deceased was also knowing both the accused persons. However, the victim-deceased had surprisingly attempted to put curtain at the time of narrating the story. Indisputably, when PW-1 Motibhai was not residing at village Nardipur, why and what circumstances he came up near the residential premises of the victim-deceased, ought to have been satisfactorily explained either by the victim-deceased or PW-1 Motibhai or both of them because the prosecution

relies on one another dying declaration which is there in the form of FIR which is a detailed narration running into number of paragraphs recorded by the Investigating Officer. It appears that the Investigating Officer did not attempt to investigate the miraculous presence of PW-1 Motibhai under strange and unforeseen circumstances near the residential block of the victim-deceased. It is a settled legal position that if the Court is not able to listen the ring of truth in the dying declaration, it would be risky to accept the contents of the dying declaration as gospel truth. When the Court is satisfied or otherwise convinced that the victim-deceased has not narrated the true version as to the injury sustained by her, the Court should try to seek strong corroboration. After giving anxious consideration to the facts and circumstances of the case and on close and careful reading of the three

statements of the victim-deceased, the following infirmities have surfaced:

1. The deceased had first available opportunity to make a statement such as the cause of injury sustained by her and the act of rape committed by two persons at the time when PW-1-Motibhai, a suspended Constable of Kalol Police Station, had entered the residential premises of the deceased and also at the time when two of her neighbours were there and had helped her in shifting her in the injured condition upto the jeep car arranged by PW-1 and they were there during all the period till the jeep car was arranged. There is no evidence of convincing nature that she had made any statement in this regard.

2. PW-1-Motibhai is a resident of village Pachot and when he was duty bound to go to Kalol Police

Station for getting his presence marked or for any other purpose, there was no need for PW-1 Motibhai to go to Nardipur, where the alleged incident had taken place. So the presence of Motibhai at 07-30 p.m. at Nardipur has created a strange and suspicious circumstance and when his conduct is impeached by the defence-side by establishing that PW-1 Motibhai had close relations with the victim-deceased, PW-1 Motibhai would have utilised intervening time gap and opportunity to tutor the victim-deceased till they reached the Civil Hospital at Ahmedabad. The fact that PW-1 Motibhai had not informed either Kalol Police Station or hospital duty Police Constable personally as to the story told by the victim to him with regard to the cause of injury sustained by the victim-injured, is also one more strange

circumstance, otherwise the first statement of the injured could have come on record genuinely.

3. It is the say of the victim-deceased that the victim-deceased had been to Kalol for purchase of grocery articles and when she was returning after shopping, the accused persons had chased her from Kalol bus-stand. However, no such articles were found from the kitchen portion though the incident allegedly had occurred in couple of minutes after the entry of the victim-deceased into her residential premises.

4. The bed of the victim-deceased was found practically intact covered with the bed-sheet and the incident had occurred in the kitchen portion of her premises. The Forensic Science Laboratory expert's opinion does not confirm or corroborate the commission of

rape. The bed-sheet found intact at the time of drawing the panchnama of scene of offence/incident, makes the statement of the victim-deceased doubtful that two persons had committed rape on her and, therefore, she committed suicide.

5. The hospital case papers show that the victim-deceased herself had given history and there is endorsement in the statement made before the Doctor who admitted her in the hospital and recorded history prior to the treatment. She has stated that one Janak Barot and one 'Garasiya' have raped her and three other persons had caught hold of her. Therefore, she had committed suicide at 07-30 p.m. This version is in conflict with her statement made before the executive Magistrate which came to be recorded between 10-15 p.m. and

10-35 p.m. The victim-deceased was admitted in the hospital at 09-45 p.m.; meaning thereby, within 30 minutes of her earlier statement, she had changed her version and made two startling substantial improvements. In the statement made before the Executive Magistrate, she has omitted to state anything about the three persons who had allegedly caught hold of her to facilitate the other two accused persons so that they could rape her. In the first statement, total number of accused persons were stated to be five: two actual offenders and three abettors. However, in the second statement made after 30 minutes, she has reduced the figure of total number of accused persons from five to two persons. The second material improvement is that she has not named the other accused with the orig.accused no.2

(deceased). The another accused was referred to as 'one Garasiya'. Who gave her the name of 'one Garasiya' during this period of 30 minutes, was the clinching question which was required to be carefully examined and scrutinised by the trial Court. The evidence shows that PW-1 Motibhai was the only person attending her during her treatment. The Executive Magistrate has stated that the statement of the victim-deceased had been recorded at the time when she was undergoing treatment after her admission in the hospital because in the second statement she has categorically named the appellant. According to Shri Munshi, the present appellant has been wrongly branded as 'Garasiya'. In Gujarat, the Rajputs who have been conferred special privileges by the erstwhile State are known as

'Garasiya'. Thus, the word 'Garasiya' is used mainly for the Rajputs or for the persons who have been conferred with such special privileges by the erstwhile State. The present appellant is neither 'Garasiya' nor Rajput. Thus, the introduction of the name of the present appellant as accused is in total conflict with the statement of the victim-deceased made before the doctor. These improvements make the dying declaration made by the victim-deceased before the Executive Magistrate not only doubtful but the statement made under the influence and tutorship of PW-1 Motibhai. When it is claimed by the victim-deceased that she was not knowing the second accused (appellant herein) by name, in the second statement she has referred to the second accused as 'Kishor Garasiya'

serving in a factory at Kalol and the evidence shows that for some period both of them had served together in the same factory. If the present appellant had committed rape, she would not have omitted his name in her statement made before the doctor where she did refer to the name of orig.accused no.2-Janak Barot.

6. There is conflict in the evidence as to the number of scooters because she has referred to two scooters in the statement made before the Executive Magistrate and as such there is no corroboration as to the number of scooters if the statement is read in light of the evidence of PW-1 Motibhai because PW-1 Motibhai has deposed that he had seen both the accused persons fleeing on a scooter.

7. The time factor if is calculated does not support the story emerging from the statement made before the Executive Magistrate because she has claimed that at about 07-00 p.m. she had reached Nardipur and if one walks up this distance on feet it would take about 10 minutes to reach the building where she was residing; meaning thereby, she would have reached her home at 07-10 p.m. or 07-15 p.m. It was not impossible for the accused persons either to intercept her when she was on the way or to enter into the house immediately after her entry in her residential premises. The time of commission of suicide is 07-30 p.m. as per the say of the prosecution. The accused persons are supposed to have stayed there for about 15 to 20 minutes and none of the neighbours have deposed that they had heard any

shouts of resistance or quarrel. She claimed that she had poured kerosene on her body. However, the postmortem note says that her hairs were comparatively intact qua the other lower parts of her body. As she had disclosed the fact of commission of rape at initial stage of her admission in the hospital, necessary samples were drawn and the report of the Public Analyst collected does not support the theory of rape. It emerges from the evidence that she had tried to suppress her acquaintance with the orig.accused no.2-deceased as well as the present appellant and there is satisfactory evidence on record to show that the victim-deceased was knowing both the accused persons and both the accused were also knowing the victim-deceased as the victim-deceased was serving in a factory at Kalol and for some

period, she was the co-worker of the appellant herein. There is no endorsement of the doctor, who was treating her, in the dying declaration recorded by the Executive Magistrate at the time when her statement was being recorded. There is no evidence to show that the Executive Magistrate had confirmed about the state of mind of the victim-deceased from the doctor who had endorsed in the Yadi sent to the Executive Magistrate, and the signature on the Yadi is also not satisfactorily found proved. True it is that it is not necessary to take endorsement of doctor before starting to record the dying declaration and also at the conclusion of recording of the dying declaration; but at least there should be some evidence to show that at the time of recording of dying declaration, the doctor

was satisfied that the deponent of the statement is conscious and physically and mentally fit to make a statement.

8. It is the duty of the Executive Magistrate or the recorder of the statement to ascertain as to whether the deceased is under the influence or tutorship or not. It is in evidence that PW-1 Motibhai was the person who got the victim-deceased admitted in the hospital. The victim-deceased is supposed to be in a female ward of the hospital. At least a doctor or nurse who was treating her ought to have endorsed the dying declaration recorded by the Executive Magistrate.

9. In her statement, the victim-deceased has stated that her mouth was stuffed with a piece of cloth and, therefore, she could not raise her shouts. When the

evidence shows that the victim-deceased committed suicide after both the accused persons left the premises, she could have raised her shouts removing the stuffed piece of cloth from her mouth to prevent the safe escape of the accused persons. Even the said piece of cloth could have been recovered during the panchnama.

10. About 13 to 14 questions were asked by the Executive Magistrate to the victim-deceased but no where she has stated that three persons had caught hold of her when she was raped. On the contrary, her statement that both the accused had stuffed her mouth with a piece of cloth so that she could not raise her shouts or resist, rules out the earlier history given by her to the doctor.

11. The panchnama Ex.21 does not speak about the smell of kerosene from hairs of the victim-deceased. There was some swelling on the left-side eye of the victim-deceased, even then the 'bindi' was intact on her forehead. The private part of the victim-deceased was found burnt. Thus, it appears that somebody had sprinkled kerosene on her and thereafter, she might have blazed her. It is very likely that a third person may have thrown matchstick on the body of the victim.

12. The case papers show that the victim-deceased had sustained total about 95% burns injury; 18% on both the hands, 36% on both the legs, 18% on her breast and abdomen, 18% on her back portion and only 5% injuries were there on her neck and face portion,

including the hands. Though the matchbox was collected and recovered, the smell of kerosene was not there. The private part had the maximum injury. This speaks volumes and the aforesaid percentage of injuries vis-a-vis the other circumstances need appreciation in the background of other facts stated by her, wherein she has stated that she had married before 11 years. She has two children, one son and one daughter. Both of them are with her husband and she was residing at her parental village at the time of incident. She was driven out by her husband from her matrimonial home. She had even quarrels with her brother-in-law and her husband was mother's boy popularly known as “Mavadiyo”. She has stated that the house of her landlord was closed when she reached home from Kalol. But the

evidence shows that the other two tenants were there in the building. Total four families were occupying the building. One block was occupied by the victim-deceased and the other two blocks were occupied by the other two tenants and in one of the blocks on the ground floor, the landlord was staying. But according to her, PW-1 Motibhai and Gokabhai Patel had reached first when she shouted for help and both of them had extinguished the fire with the help of a large quilt. For the strange reasons, the quilt has not been recovered by the Investigating Officer. So who extinguished the fire and with which article, remains under clouds because the said Gokabhai Patel has not been examined. So the victim-deceased does not get any corroboration as to the role played by the said Gokaldas alias

Gokabhai Patel. But the presence of Gokaldas Patel at the spot of incident in couple of minutes from the actual incident, has come on record.

13. In the statement recorded on 14th January 1995 at about 03-35 p.m., the victim-deceased has stated that she knows both the accused persons for the last about 20 to 25 days. It is in evidence that she has started staying in the house where the incident had occurred prior to about 15 days of the incident in question. There is no evidence on record to show as to who was making the financial arrangements for her. The presence of PW-1 Motibhai near the victim-deceased even at the time when the statement of victim was being recorded by the police on 14th January 1995 in the hospital, is sufficient to establish that this

PW-1 Motibhai perhaps was not in a mood to leave the injured alone in the hospital so that she may not be either interrogated or asked anything by anybody in his absence.

7. Shri Munshi has argued vehemently that the learned trial Judge has failed in considering all the aforesaid infirmities and speaking circumstances which go to the root of the credibility of the dying declaration made by the victim-deceased.

8. The second dying declaration which is recorded in the nature of statement of the victim-deceased by the police is on record. On perusal of this document at Mark 72, it is clear that a patient having 95% burns injury under the influence of drugs and constant treatment cannot give such a detailed statement running into about two foolscap sheets. In the first statement, she has stated that both the accused had committed rape on her, one after the another. In her further

statement recorded by the police, she has stated that the present appellant was the first person who committed rape on her. She has stated the name of present appellant as 'Kishor Rajput' but as such he is not the Rajput, but he is a barber. In her statement, she has further stated that before pouring kerosene on her body and setting herself on fire, she had bolted the door of her house from inside. There is some evidence that the bolted house was forcibly opened by PW-1 Motibhai, but as such there is no reference or evidence which can be said to be corroborative piece of evidence in the panchnama of scene of offence and the house of the victim-deceased. She has referred the presence of Golaldas alias Gokabhai Patel, Rajubhai Gokaldas Patel and PW-1 Motibhai; and further stated that Gokabhai Patel had accompanied her when she was brought to the Civil Hospital. It appears that the theory of bolting the house from inside has come on record for the first time at the time when her further statement came to be recorded by Police Sub-Inspector, Kalol Police Station. It appears that to give

strength to the theory of suicide, this fact has been introduced as an afterthought. There is some logic in the argument of Shri Munshi that this theory was introduced only with a view to save the skin of PW-1 Motibhai. Perhaps he may be the person responsible in compelling her to either commit suicide or instigate the accused persons to sprinkle kerosene on her body; otherwise the Investigating Officer would have interrogated PW-1 Motibhai as he was the only strange person present at the spot of the incident and practically at the time when the neighbours rushed to rescue the injured victim.

9. It is relevant to note that there is clear evidence as to the presence of gas stove in the very premises where the incident occurred, which indirectly indicates that the deceased must be using that stove for the purpose of cooking. The incident is of 13th November 1995, however, certain crucial panchnamas including the panchnama of the body of the victim-injured, etc. have been drawn at a very belated stage and it was possible for the

Investigating Agency to mould the language. For the reasons best known to the Investigating Agency, the Forensic Science Laboratory (Mobile) ought to have been sent at the spot immediately, which was in fact called on 15th November 1995. The spot of the incident was shown by the Police Sub-Inspector Shri Vaghasiya of Kalol Police Station to the officers of the Forensic Science Laboratory (Mobile) at 09-00 a.m. on 15th November 1995. The scene of the offence panchnama has been drawn practically at the same time because the time of scene of offence panchnama at Ex.59 shows that the same was drawn between 09-00 a.m. and 10-30 a.m. on 15th November 1995 and in that panchnama one witness Rajubhai Gokalbhai is referred to as the person who had shown the spot of incident to both the panchas of panchnama at Ex.59. Thus, the place of the incident remained in control of Police or any unknown person; it may be PW-1 Motibhai; even then nothing incriminating against the accused persons was found. The unknown intruders normally would not know as to where the actual user of the house keeps the kerosene, if it is

available in the house. Only PW-1 Motibhai was the person, who according to the evidence, was visiting the house of the victim-deceased frequently and the neighbours were knowing this fact. In the same way, there is reference of one telephone instrument of “Orpat” model. Surprisingly, there is no reference in the note prepared by the Forensic Science Laboratory at Ex.23 or the scene of offence panchnama at Ex.59 as to whether the said telephone was in working condition and any dial tone was there or not. Why the Investigating Agency has kept curtain on this aspect, has not been clarified either by PW-1 Motibhai or the victim-deceased. Though the victim-deceased has given a detailed complaint on the next day i.e. on 14th November 1995 to the Police Sub- Inspector, Kalol Police Station, where she has narrated many facts minutely, it is argued by Shri B.P. Munshi that the complaint projected as FIR is inadmissible as FIR came into existence at a belated stage and conveniently by the Police Sub-Inspector, Kalol Police Station after taking certain steps by the Police. It may not

be considered as relevant piece of evidence in the nature of FIR. This argument has enough force; especially the report sent to the learned Judicial Magistrate First Class under Section 157 of the Code of Criminal Procedure, 1973, which had reached late because the FIR was registered in the Kalol Police Station in the evening of 14th November 1995. The Kalol Police was very well aware about the incident since 13th November 1995. There is reference of one entry referred to as “Janva Jog” entry and subsequent steps taken by the police, are sufficient to hold that the statement of the victim-deceased is not an FIR within the meaning of Section 154 of the Code of Criminal Procedure, 1973. True it is that the very statement can be looked into being a statement falling under the category of dying declaration under Section 32 of the Indian Evidence Act. An innocent lady normally would go to the house of a neighbour if she is conscious that two adult males, either known or unknown, are chasing her against her wish since some kilometres; or she would shut and bolt the door of her house from inside

immediately after her entry in her house. While drawing panchnama of scene of occurrence, the Police Sub-Inspector tried even to open the aluminum tin and it has been noted that the tin was containing paddy (Bajri) flour. This very officer has not cared to see as to whether the gas stove was in a working condition and the telephone lying on the table was live. It appears that the panchnama is drawn conveniently so that the same can suit the theory developed by the complainant side. Non- examination of Rajubhai Gokaldas Patel or his father Gokalbhai @ Gokabhai Patel makes the prosecution case weaker and more doubtful and the same uproots the trustworthiness of the statements made by the victim-deceased. As discussed hereinabove, PW-2 Dahyaji Thakor in his deposition at Ex.18, has stated that PW-1 Motibhai had broken opened the doors of the house of the victim-deceased and thereafter, he saw the lady burning. There is no iota of evidence which can corroborate this version of PW-2 Dahyaji. This witness claims that Rajubhai Gokaldas had reached there at the spot and the

said Rajubhai had managed to get the for vehicle at the instance of PW-1 Motibhai for taking the victim-deceased to hospital; even then the scene of offence panchnama does not refer to this aspect. On the contrary, the said panchnama states that inside stopper of the door was intact. It appears that the door was having two types of bolts, one vertical and one horizontal; and both were found intact. This conflict ought to have been resolved by the prosecution because PW-2 Dahyaji has not been termed hostile, meaning thereby, the prosecution intends to rely on his deposition. This very PW-2 Dahyaji has stated that he had neither seen the accused persons on the date of incident nor he knew them. The evidence suggests that the victim-deceased was staying at Panchot initially and thereafter she had shifted to Nardipur at her parental village. Who was managing for the expenses of her house after her husband deserted her, is a question and it is alleged by Shri B.P. Munshi that PW-1 Motibhai, a mastermind, had relations with the victim-deceased. Considering the age of the victim-

deceased and the said PW-1 Motibhai, it is easy to infer that the age gap between the victim-deceased and PW-1 Motibhai was comparatively big. It is very likely that the victim-deceased might have shifted from Kalol to Nardipur against the wish of PW-1 Motibhai and under suspicion that the victim-deceased had developed relations with some person, also may be one of the accused, she might have been brought under pressure and thereby, either she might have been killed or might have been dragged to a situation under which she committed suicide. Either PW-1 Motibhai or the person who was immediate near to the victim-deceased, actually would have been prosecuted, is the say of Shri B.P. Munshi.

10. The crucial question raised by the Court has been logically answered by Shri B.P. Munshi and it is argued that the learned trial Judge was under legal obligation to consider the explanation given by the accused when the same was supported by cogent documentary evidence. When it has come on record that the victim-deceased was in acquaintance with both the

accused persons and she was knowing both of them prior to the incident and with one of them (appellant herein) she had served in one of the factories at GIDC, Kalol, the learned trial Judge ought to have considered while evaluating the evidence some incidents which had taken place prior to 13th November 1995. Surprisingly, the victim-deceased claims that her husband was a drunkard and under family atrocities, she was driven out of her matrimonial house. Her two children were practically snatched away from her. In such a situation, normally the parents of such a victim lady would help; but the evidence shows that not a single member from her parental side had tried to help her. There is nothing on record to show that even the husband was prosecuted for maintenance in the Civil or Criminal Court, otherwise such a documentary evidence could have come on record. None of the close relatives of the parental side of the victim-deceased had visited the hospital till she survived. It is claimed by Shri B.P. Munshi that the victim-deceased might have been killed by PW-1 Motibhai or she might have

committed suicide at the instance of this very person. Though till trial the defence has also attempted to show that it might be an accident as there was no kerosene smell in number of articles found, including the match-box and even when the hairs of the victim-deceased were intact, the theory of accident was also one of the aspects which was required to be considered by the learned trial Judge. On the contrary, the Court is of the view that certain facts situations indicate that even PW-1 Motibhai could have been prosecuted either under Section 302 or 306 of the Indian Penal Code. The present appellant or even the orig.accused no.2 (deceased) could not have been held guilty. The appellant herein while placing his defence before the Court has produced a list of documents at Ex.74. Prior to placing these documents, pointed suggestions were made to two prosecution witnesses examined i.e. PW-1 Motibhai and the PW-10 Investigating Officer. One document at Mark 74/1 shows that the appellant had given a complaint to Kalol City Police Station alleging against the victim-deceased and one

person who had come on a scooter that the appellant herein was assaulted and looted by them. It is the say of the appellant herein that the said another person was PW-1 Motibhai. Actually, the victim-deceased and appellant herein were the victims of PW-1 Motibhai or the victim-deceased was a party in the said incident. But it is not necessary to go into details of the same. The date of the said complaint is relevant, which is 23rd October 1995. It is very likely that the appellant may be trying to see that the victim goes out of the clutches of PW-1 Motibhai and when both of them i.e. victim-deceased and the appellant, were in search of a different location for residence, PW-1 Motibhai acted in the manner of a suspended Police Constable and looted the appellant herein. The time gap between the date of incident in question and the date of complaint given to the Kalol Police Station by the appellant herein, in respect of assault and loot, if is considered, it clearly helps the appellant herein because as per the case of the prosecution, the victim-deceased had started residing at

Nardipur at her parental village prior to 15 days. This indirectly indicates that the victim-deceased as well as the appellant herein must have decided not to search any other house at Kalol and ultimately, the victim-deceased started residing at Nardipur in a rented premises where the incident in question has occurred. So in the later part of the month of October 1995, the victim-deceased might have shifted to Nardipur at her new rented premises. It is very likely that PW-1 Motibhai might have seen or suspected that both the accused or at least one of them, was visiting the house of victim-deceased at Nardipur. On account of his annoyance or excitement to establish supremacy over the victim-deceased, he might have acted in an unusual manner with the victim-deceased. There is reference of presence of swelling over the eye-brow near the left eye of the victim-deceased. This indicates something about injury, otherwise this injury would not have been noticed as an independent body situation. The victim-deceased in her statement could have explained as to how she

sustained this injury. The prosecution also could have got explanation from the doctor examined who treated and performed autopsy on her, as to how and in what circumstances, such an injury would occur in a case of simple suicide by an individual on pouring kerosene on her body. Even PW-1 is also silent on this point. He has not stated that the victim-deceased had stated anything to him as to the physical assault made on her before commission of rape. As the victim-deceased was injured with burns and was lifted in a large quilt, it was not possible that some outside article could have dashed near her eye. She must have been lifted carefully by all the concerned persons. It was open for the prosecution to show that the copy produced by the appellant herein vide Mark 74/1 is a fabricated document because it bears the signature of one responsible officer about the receipt of the complaint. The police may not have registered the FIR as no name of the accused was mentioned in the said complaint. The other document at Mark 74/2 suggests that the victim-deceased was prosecuted by her father-

in-law for the offence punishable under Section 379 read with Section 114 of the Indian Penal Code in the Court of learned Judicial Magistrate First Class in the month of June 1995, along with one co-accused. The other document shows that the victim-deceased had filed a complaint on 27th June 1995 against her husband and other male members of her matrimonial house under Section 498(A) read with Section 114 of the Indian Penal Code. This document is at Mark 74/3. The date of this document shows that the complaint for the offence punishable under Section 498(A) read with Section 114 of the Indian Penal Code was filed after filing of the complaint of theft against the victim-deceased. One document at Mark 74/4 clearly suggests that the appellant herein had made telephone call to District Superintendent of Police on 22nd October 1995. This date correlates with the date of complaint produced vide Mark 74/1 i.e. 23rd October 1995. One affidavit is also produced by the appellant dated 20th November 1995, i.e. after arrest of the appellant by Kalol Police. The said affidavit shows that

the appellant was discharging his services to a patient who was operated and kept at Bapunagar General Hospital. The Court cannot legally consider this document because to get this fact on record, the appellant herein has not examined the deponent of the said affidavit i.e. Ramesh Karsan Sitapara, as defence witness. The document at Mark 76/1 establishes the genuineness of the fact about lodging of the complaint on 23rd October 1995 and it is claimed that the document at Mark 74/1 was obtained from Kalol Police Station itself.

11. It is settled that the accused is not supposed to lead cogent and convincing evidence to prove his defence. The accused is entitled to bring convincing probabilities on record. The learned trial Judge has not considered various crucial aspects which go to show that the accused persons might have been arraigned by the mastermind i.e. PW-1 Motibhai.

12. The very discussion which has been made in the foregoing paragraphs, automatically makes the version of PW-1 Motibhai doubtful. The version

of a person who is individually under thick clouds of doubts, ought not to have been accepted as gospel truth. The learned trial Judge ought to have considered before accepting the say of PW-1 Motibhai, the following glaring aspects :

(i) PW-1 Motibhai is a suspended Police Constable of Kalol Police Station and it is possible that he might have great influence in the said Police Station; and as an officer being under suspension, he was supposed to get his presence marked at Kalol Police Station everyday.

(ii) He claims that he was staying alone at Kalyanpur area of Kalol Town in the year 1995 though his family members resided at village Panchot of the very Taluka. He also claims that he was making round trip between Panchot and Kalol. He admits that he had given his house on rent to the victim-deceased and on 28th October 1995 she had vacated

the said premises.

(iii) On the date of incident, this witness PW-1 Motibhai had started from village Panchot at about 05-30 p.m. to reach at Kalol. He has not stated in his examination-in-chief as to what was his mode of transport, but it is in evidence that while going to Kalol from village Panchot, there is no need to come down to village Nardipur. It is not the village falling between village Panchot and Kalol Town. This witness has claimed that he had gone to the house of the victim-deceased at about 07-30 p.m. for recovery of amount of rent; even then he has not produced a copy of the rent receipt book so as to show that he was regularly recovering rent from the victim-deceased. This witness has deposed that he has seen both the accused persons proceeding on a scooter

when he had reached to the residence of the victim-deceased; and when he reached, the victim-deceased was shouting and at that time one Gokaldas Patel was also there and this Gokaldas Patel is the brother of the landlord of the said building where the victim-deceased was residing. He does not claim that he had broken opened the doors of the house of the victim-deceased. He has stated that the victim-deceased had given the names of both the accused persons being the persons who had committed rape on her and also as to the cause of her committing suicide. It is in evidence that he was serving in the Police Department for the last 32 years and was dismissed from service in the year 1997. He was suspended twice during his service career and once he was an accused of the offence punishable under Section 307 of the Indian Penal

Code. He deposes that he had seen the appellant for the first time on the date of incident and had never seen the orig.accused no.2-Janakkumar Barot (deceased) prior to the incident, while answering to the pointed question put to him in the cross-examination.

(iv) There is material contradiction as to who had accompanied the victim-deceased when she had come to get house on rent at Nardipur. It is denied by this witness that he was the person who looted the appellant herein when the appellant was trying to secure a house on rent for the victim-deceased. Of course, he has denied but it is alleged that under his pressure, a written complaint of the appellant herein was not taken as FIR by the Kalol Police and, therefore, the appellant herein was compelled to make a telephone call to the

District Superintendent of Police.

(v) It was possible for this witness to inform Kalol Police immediately and to take injured to the Kalol Civil Hospital first so that she could get treatment immediately. But to earn time, he decided to take her to Civil Hospital at Ahmedabad. This act of whiling away the time to create a story makes the version of this witness doubtful; and even his conduct is also not found natural if the victim-deceased was really his ex-tenant. If classified, this witness ought to have been placed as a person interested in the result of the case from the very beginning, and a person who must have acted consciously that he himself does not come under close scanning of the Investigating Agency. It is not safe to believe the words of PW-1 Motibhai that the victim-deceased

had made any oral declaration before him, otherwise the prosecution could have produced corroborative piece of evidence in this regard by examining Gokaldas @ Gokabhai, who according to the victim-deceased as well as PW-1 Motibhai, was present since beginning.

13. Shri B.P. Munshi, learned counsel appearing for the appellant herein, has placed reliance on various decisions. There is some force in the argument of Shri Munshi that if PW-1 Mothibhai-star witness was not knowing the accused persons from the very beginning, why no formality of carrying out Test Identification (T.I.) Parade was made by the Investigating Agency. It appears that the Investigating Officer was convinced personally that the claim made by PW-1 Motibhai that he had not seen any of the accused persons prior to the date of incident, is a hoax.

14. The learned trial Judge has mainly recorded the judgment and order of conviction and

sentence on the strength of the dying declaration made by the victim-deceased. It is sufficient to refer to one decision cited by Shri B.P. Munshi in the case of ***Nallapati Sivaiah v. Sub- Divisional Officer, Guntur, A.P., reported in AIR 2007 SC 1038***. Referring to the case from Gujarat i.e. in the case of Smt. Paniben v. State of Gujarat, and other decisions, the Apex Court in paragraph nos.20 and 21 has observed as to which aspects are to be considered before giving proper weightage to a dying declaration. It would be beneficial to refer to the relevant paragraph nos.20 and 21 of the cited decision, which are as under :

> “20. The court has to consider each case in the circumstances of the case. What value should be given to a dying declaration is left to Court, which on assessment of the circumstances and the evidence materials on record, will come to a conclusion about the truth or otherwise of the version, be it written, oral or by sign or by gestures. It is also a settled

principle of law that dying declaration is a substantive evidence and an order of conviction can be safely recorded on the basis of dying declaration provided the court is fully satisfied that the dying declaration made by the deceased was voluntary and the author recorded the dying declaration as stated by the deceased. This Court laid down the principle that for relying upon the dying declaration the court must be conscious that the dying declaration was voluntary and further it was recorded correctly and above all the maker was in a fit condition- mentally and physically- to make such statement.

21. In Smt. Paniben v. State of Gujarat, MANU/SC/0346/1992 this Court while stating that a dying declaration is entitled to great weight however cautioned to note that the accused has no power to cross-examination.

Such a power is essential for eliciting the truth as an obligation of oath could be. This is the reason the Court also insists that the dying declaration should be of such a nature as to inspire full confidence of the Court in its correctness. The Court has to be on guard that the statement of deceased was not as a result of either tutoring, prompting or a product of imagination. The Court must be further satisfied that the deceased was in a fit state of mind after a clear opportunity to observe and identify the assailants. Once the Court is satisfied that the declaration was true and voluntary, undoubtedly, it can base its conviction without any further corroboration. It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence. This Court has laid down in

several judgments the principles governing dying declaration, which could summed up as under:

(i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration (Mannu Raja v. State of M.P., MANU/SC/0174/ 1975).

(ii) If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration. (State of U.P. v. Ram Sagar Yadav MANU/SC/0118/1985; Ramavati Devi v. State of Bihar MANU/SC/0135/1983)

(iii) This Court has to scrutinise the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had opportunity to observe and identify the assailants and was in a fit state to make the

declaration. (K. Ramchandra Reddy v. Public Prosecutor MANU/SC/0127/1976)

(iv) Where dying declaration is suspicious and it should not be acted upon without corroborative evidence. (Rasheed Beg v. State of M.P. MANU/SC/0169/1981)

(v) Whether the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected. (Kake Singh v. State of M.P. MANU/SC/0160/1981)

(vi) A dying declaration which suffers from infirmity cannot form the basis of conviction. (Ram Manorath v. State of M.P. MANU/SC/0207/1981)

(vii) Merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected. (State of Maharashtra v. Krishnamurti Laxmipati Naidu

MANU/SC/0238/1980)

(viii) Equally, merely because it is a brief statement, it is not be discarded. On the contrary, the shortness of the statement itself guarantees truth. (Surajdeo Oza v. State of Bihar MANU/SC/0269/1979)

(ix) Normally the court in order to satisfy whether deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eyewitness has said that the deceased was in a fit and conscious state of mind to make this dying declaration, the medical opinion cannot prevail. (Nanahau Ram and Anr. v. State of M.P. MANU/SC/ 0334/1988)

(x) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon."

15. In paragraph nos.22 to 30 of the cited decision, the Apex Court has discussed various decisions and after referring to the facts of the case on hand, ultimately recorded conclusion that “it is unsafe to record a conviction on the basis of dying declaration in the cases where suspicion is raised with regard to correctness of the dying declaration”. In such cases, the Court may have to look for some corroborative piece of evidence by treating dying declaration only as a piece of evidence.

16. In the present case, the dying declaration does not appear to be a genuine dying declaration and there is no cogent, convincing or reliable piece of evidence which can be taken as a corroborative piece of evidence. The investigation is also found incomplete and unfair. The crucial independent witnesses i.e. Rajubhai Gokaldas Patel and Gokaldas alias Gokabhai Patel have not been examined. There is nothing worth explanation about the delay in recording the FIR. Thus, there was no scope for the learned trial Judge to convict any of

the accused persons. On the contrary, the learned trial Judge ought to have ordered thorough investigation by the independent agency like the CID Crime, etc. and to ascertain as to whether PW-1 Motibhai himself is responsible for any of the offences punishable under Section 302 or 306 of the Indian Penal Code or not because sexual jealousy may put an individual to an inexplicable state of mind. As the learned trial Judge has not done it, after a lapse of several years this Court is also not inclined to pass any such orders but it is observed that the judgment and order of conviction and sentence under challenge is based on erroneous findings, and improper and illegal appreciation of evidence and such judgment and order of conviction and sentence cannot be sustained in the eye of law and, therefore, the same is required to be reversed.

17. In view of aforesaid observations and discussion, the present appeal is hereby allowed. The judgment and order of conviction and sentence dated 21st July 2004 passed by the

learned Sessions Judge, Mehsana, in Sessions Case No.236 of 1996, is hereby quashed and set aside. The appellant-orig.convict is hereby ordered to be acquitted from all the charges levelled against him in respect of the offences in question. The appellant is hereby ordered to be set at liberty forthwith, if he is not required by the Jail Authorities for any other purpose. The amount of fine, if any paid, be refunded to the appellant on proper identification. The bail bond, if any, shall stand discharged. As the trial against the orig.accused no.2-Janak Barot (deceased) stood abated, it would not be necessary to make pass any remark in that regard.

***(C.K. Buch, J)***

Aakar